Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 274.

UNITED STATES OF AMERICA,
Petitioner,

v.

88 CASES, ETC., "BIRELEY'S ORANGE BEVERAGE" GENERAL FOODS CORPORATION,
Claimant.

RESPONDENT'S REPLY AND BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Third Circuit (III R. 481-490, 498 [1]) is reported in 187 F. (2d) 967.

Reasons for Denying Petition.

The solicitor general's petition sets out three alleged reasons why a writ should be granted. None of them is valid. They will be dealt with in order below.

I.

For his first alleged reason the solicitor general adopts the ancient and anciently-discredited device of setting up a

1. The printed record consists of the appendices to the briefs filed in the Court of Appeals. The appendices to petitioner's brief, in two volumes paginated consecutively, will be designated "I R." and "II R." respectively and the appendix to respondent's brief, which now includes the proceedings in the Court of Appeals, will be designated "III R." References to the petition will be designated "P."

straw man and then inviting this Court to knock it down. He represents the opinion below as having held that the Federal Food, Drug, and Cosmetic Act (hereinafter generally referred to as the "Act") was not intended by Congress to protect *all* consumers, including even the ignorant, the unthinking, and the credulous, but was, on the contrary, intended to protect only that part of the population, perhaps 60 per cent (his estimate, not ours), which is of average or better-than-average intelligence (P. 10).

Of course, the court below held no such thing. In fact it was never called upon to decide whom the Act was designed to protect; but, if it had been, it would no doubt have said, as this Court and the other federal courts have uniformly said, that the Act was designed to protect *all* consumers.[2]

"All consumers" includes everybody. It includes the blind, of whom there are some 260,000 in this country[3]; it includes the illiterate, of whom there are nearly 3,000,000[4]; it includes infants and children, of whom there are probably 30,000,000 under the age of ten years[5]; it includes the aged, of whom there are perhaps 4,000,000 of the age of 75 years or over[6]; and it includes upwards of 1,000,000 delinquents, mental patients, and the like in institutions.[7]

Furthermore, in view of the fact that the Act prohibits adulteration and misbranding of feed (and drugs) for animals as well as of food and drugs for humans, its protection may well be said to extend not only to the whole

2. *U. S. v. Sullivan* (1947) 332 U. S. 689; *U. S. v. El-O-Pathic Pharmacy* (1951) F. (2d) , 1 CCH F. D. C. Law Rep. ¶ 7206 (C. A. 9); *U. S. v. 62 Packages [Marmola Prescription Tablets]* (1943) 48 F. Supp. 878 (D. C. Wis.), affirmed (1944) 142 F. (2d) 107 (C. C. A. 7), cert. denied *sub nom. Raladam Co. v. U. S.* (1944) 323 U. S. 731; *U. S. v. 2 Boxes [Poppy Seeds]* (1945) 147 F. (2d) 123 (C. C. A. 6).

3. "Statistics on the Blind", by Ralph G. Hurlin, in *Outlook for the Blind* (published by The Foundation for the Blind, Inc., New York), March, 1947.

4. STATISTICAL ABSTRACT OF THE UNITED STATES: 1950, Bureau of the Census (Government Printing Office, Washington, 1950), p. 115.

5. 1950 CENSUS OF POPULATION, Preliminary Reports, Series P-C, No. 3, Bureau of the Census (Government Printing Office, Washington, 1950), p. 8.

6. *Id.*

7. STATISTICAL ABSTRACT OF THE UNITED STATES: 1950, Bureau of the Census (Government Printing Office, Washington, 1950), p. 30.

class of *homo sapiens* but to others of the animal kingdom as well. It is estimated that there are in this country nearly 7,500,000 horses and mules,[8] nearly 31,000,000 sheep and lambs,[9] over 80,000,000 cattle and calves,[10] over 60,000,000 pigs,[11] nearly 490,000,000 chickens and turkeys,[12] and 20,000,000 dogs.[13]

All of these, human and non-human alike, eat foods and are treated with medicaments covered by the Act.

The problem facing Congress in drafting the Act was how to achieve the maximum practical protection for all these consumers; and it did not, as the solicitor general's argument suggests, decree that all labeling of baby foods should be clearly comprehensible to babies, or that whether a drum of sheep dip was deceptive in appearance should be determined by showing it to a sheep. On the contrary, Congress recognized that all animals and many humans must of necessity have their food and drugs picked out for them by that group of persons which constitutes the country's purchasers at retail. It is a large group, but is very much smaller than the entire body of consumers.

The general plan of the Act so far as foods are concerned was to outlaw the movement in interstate commerce of (a) food adulterated in the historic sense of the word, that is, food containing any harmful substance, (b) misbranded food, and (c) food, however nutritious, which was adulterated in the economic sense.

It was possible to deal with (a) in an entirely objective manner, i.e., to state categorically what constituted adulteration in the historic sense [14] and then to outlaw it.[15]

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8. *Id.*, p. 642.

9. STATISTICAL HANDBOOK OF AGRICULTURE IN THE UNITED STATES (Bureau of Agricultural Economics, June, 1951), p. 13.

10. *Id.*

11. *Id.*

12. *Id.*

13. THE WORLD ALMANAC AND BOOK OF FACTS: 1950 (New York World-Telegram and The Sun, New York, 1950), p. 846.

14. Act, § 402(a).

15. Act, § 301(a), (b), (c), and (d).

No question under (a) is here involved since the libellant agreed (Answers to Interrogatories 15 and 36, III R. 27a and 34a) that Bireley's Orange Beverage, the seized product, contains no harmful ingredient.

In the case of (b) Congress had to decide what constituted proper labeling before it could outlaw improperly labeled food, and in this area it encountered problems such as were involved in the case below. No matter how plain a label, there are some who cannot read it: The blind, the illiterate, the insane, and the very young (not to mention the dumb animals). Recognizing that, this double-barreled question had to be answered: *How plain* must food labels be, and *to whom?* The question called for a subjective answer, and when Congress answered it, it used this language:

> § 403(f). A food shall be deemed to be misbranded * * * If any word, statement, or other information required * * * to appear on the label * * * is not prominently placed thereon with such conspicuousness * * * and in such terms as to render it likely to be read and understood by *the ordinary individual under customary conditions of purchase and use.* (Italics ours.)

In prescribing that the test for misbranding lay in the reaction not of all consumers but of *the ordinary individual under customary conditions of purchase and use,* Congress gave an obvious and common sense answer to the question of how to achieve for everybody the maximum practical protection against deception. It was an answer based on the controlling fact that, but for minor exceptions, those who buy the food consumed by all of us, including the halt, the lame, the blind, the children, and the aged, are the ordinary individuals. If food is so labeled that they are not deceived, the maximum feasible protection has been achieved for everybody.[16]

16. The Act provides the same standard in the case of drugs, § 502(c) and cosmetics, § 602(c).

The case below was not a misbranding case, but was a case of alleged "economic adulteration" (c) and, as will be seen in a moment, the basic question in this area similarly calls for a subjective answer.

At this point it becomes necessary to define a few terms. Food adulteration in the *historical* or *ordinary* sense means the presence in food of some poisonous or deleterious or unlawful substance. *Economic* adulteration, on the other hand, is something quite different. Economic adulteration is a loose term covering generally the cheapening of an article by lessening its quality through the substitution of cheaper for more valuable constituents, concealing inferiority or damage in some manner, and the like. While the old pure-food act [17] contained certain provisions condemning economic adulteration,[18] there was in it no provision analogous to the provision of the Federal Food, Drug, and Cosmetic Act on the basis of which the food involved in the case below was condemned. This provision reads:

> § 402. A food shall be deemed to be adulterated • • • (b) • • • (4) if any substance has been added thereto or mixed or packed therewith so as to • • • make it appear better or of greater value than it is.

This language immediately raises a double-barreled question similar to that raised in the misbranding area. The question is: Appearance *of what,* and *to whom?* [19] The court below, relying on what Congress itself had done in resolving the similar question in the misbranding area, said (III R. 484):

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17. Food and Drugs Act of June 30, 1906, 34 Stat. 768, 21 U. S. C. (1934 ed.) § 1 *et seq.*

18. 21 U. S. C. (1934 ed.) § 8.

19. Act, § 402(b)(4) also refers to substances added to increase the bulk or weight of a food, and subsection IV of the libel in the case below (III R. 72) alleged that excess water had been added to increase the bulk of the product in violation of the Act. As the court below indicated, this portion of the libel was not pressed either at the trial or on the appeal (III R. 482).

> The correct standard was the reaction of the ordinary consumer under such circumstances as attended retail distribution of this product.

The basic issue is the same, deception of those who buy the food, and there is no conceivable reason why the answer should not, as the court below held, also be the same. Other federal courts, when faced with the same question, i.e., who it is who has to be deceived, have uniformly reached the same answer. As a matter of fact this is true even of *U. S. v. 62 Packages* [*Marmola Prescription Tablets*] (1943) 48 F. Supp. 878 (D. C. Wis.), affirmed (1944) 142 F. (2d) 107 (C. C. A. 7), cert. denied *sub nom. Raladam Co. v. U. S.* (1944) 323 U. S. 731, upon which the solicitor general places such heavy reliance in his petition (P. 10-11). The case involved Marmola tablets, an obesity cure, which had been seized on a misbranding charge. The trial court had the question of what standard to adopt in determining whether the label was deceptive, and in deciding that question it said this (887):

> *The substantial portion of the public, after reading the labeling in question,* would conclude that obesity is caused by the lack of some substance in the human body that Marmola supplies; that Marmola is a safe and efficient remedy for obesity, which is not a fact. (Italics ours.)

The decision, therefore, is that *the substantial portion of the literate purchasing public* has to be deceived. There is here no authority for the charge to the jury given in the case below, that whether the Act was violated depended upon "whether *any part of the public,* the vast multitude which includes the ignorant, the unthinking, and the credulous, and those who don't stop to analyze in making a purchase would be so mislead" (III R. 456a, italics ours). It is true that the trial court (not the Court of Appeals) in the *Marmola* case found something to say about "the vast

multitude which includes the ignorant, etc.", but it was no part of the decision on who had to be deceived. This being a misbranding case (as was also the *El-O-Pathic* case) the Act itself specifically defined the person misled to be "the ordinary individual under customary conditions of purchase and use." *After* deciding that point, the court went on to state *the purpose of the law,* which, as we have pointed out at page 2, *supra,* was to protect the entire public. In emphasizing how great and diverse the public is, the court indulged in the harmless hyperbole which the solicitor general's client in this proceeding[20] has taken to its bosom not only in the case below but also in other cases.[21] As a *description of the public,* the language is merely a bit of fancy writing; as a standard to be applied to determine *who must be deceived,* it is supportable neither in theory nor on authority, and no case other than the case below has been found where FDA has been able to induce a trial court to adopt it as a *standard for deception.*

The following cases dealing specifically with the question of a standard for deception should be noted. In all of them the standard sanctioned was virtually the same as that adopted by the Court of Appeals in this case.

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20. The solicitor general's client is the Food and Drug Administration of the Federal Security Agency, and it is hereinafter generally referred to as "FDA".

21. It is interesting to learn from the solicitor general's petition (P. 11) that the "vast multitude" language came from *Florence Manufacturing Company v. J. C. Dowd & Co.* (1910) 178 Fed. 73 (C. C. A. 2), not a food-and-drug case, which was decided more than a quarter of a century before the Act was passed. It is, however, plain that the court in that case was using as its test of deception not any part of the public, as the solicitor general would have this Court believe, but the *purchasing public.* The "vast multitude" language got into the case below because it was included in FDA's tenth request to charge, which the trial court gave (III R. 455a-456a). As the solicitor general points out (P. 10-11), FDA was successful in getting the "vast multitude" language also into the recent opinion in *U. S. v. El-O-Pathic Pharmacy* (1951) F. (2d) , 1 CCH F. D. C. Law Rep. ¶7206 (C. A. 9), but there again the only use made of it (and it is a proper use) is to describe the *purpose* of the Act. See also *U. S. v. 30 Cases [Leader Brand Strawberry Fruit Spread]* 93 F. Supp. 764 (D. C. Iowa), which involved the condemnation of a fruit product for alleged misbranding. While the court used the "vast multitude" language, when it came to deciding who had to be deceived it pointed to the *ordinary buyer.*

U. S. v. 9 Bottles [*Colusa Natural Oil*] (1947) 78 F. Supp. 721 (D. C. Iowa), affirmed *sub. nom. Colusa Remedy Co. v. U. S.* (1949) 176 F. (2d) 554 (C. A. 8), cert. denied (1950) 338 U. S. 911. Libel for misbranding of oil sold as remedy for skin diseases. The trial court sustained the libel and applied as the standard *"a person of average intelligence"* (italics ours) (723). This standard was specifically approved by the Court of Appeals (559).

U. S. v. 116 Boxes [*Arden Assorted Candy Drops*] (1948) 80 F. Supp. 911 (D. C. Mass.). Libel against packaged candy charging violation of § 403(d) of the Act on the ground that the container was slack-filled. There was a real contest as to what standard should be applied, and the court stated the standard was whether the container would be likely "to mislead *the ordinary purchaser of this type of merchandise,* not one who was particularly attentive or prudent" (italics ours). The court specifically refused to accede to FDA's view that the test was whether the package would "mislead an average five-year-old child who might expect the box to be filled to overflowing". "Infantile anticipation is not the test," the Court said (913).

U. S. v. Pinaud, Inc. (1947) 1 CCH F. D. C. Law Rep. § 7108 (D. C. N. Y.). Criminal proceeding for alleged misbranding of hair tonic. In charging the jury the court said: "The goods are misbranded if they bear any statement which would deceive or mislead *any purchasers who are of normal capacity and use that capacity in a common sense way.* That is the test and whether there may be any or few so deceived is not material" (italics ours). The court specifically rejected FDA's contention that the Act would be violated "if anywhere in these United States, regardless of a person's intelligence or literacy, if anywhere there may be a man or woman who might be misled • • •".

U. S. v. Cataldo (1946) 157 F. (2d) 802 (C. C. A. 1). Appeal from judgment dismissing a libel seeking condemnation of packaged candy on the ground that the packages were slack-filled. The judgment was affirmed, and the court

held that the test was the effect on "*an average purchaser*" (italics ours) (804).

U. S. v. 70½ Dozen Bottles ["666"] (1942) K & D 89[22] (D. C. Georgia). Condemnation proceedings against a drug for alleged misbranding. Trial before a jury, which found for FDA. In its charge, the court used as a standard for deception "*a purchaser or anybody else of average intelligence*" and "*an average member of the buying public who was not informed*" (italics ours) (90).

U. S. v. Sekov Corporation (1943) K & D 448 (D. C. Calif.). Suit to enjoin interstate shipment of reducing preparation on ground that it was allegedly misbranded. An injunction was issued, and the court applied as the standard "the *average* person" and "the *average* woman" (italics ours) (449).

Further support for this view as to who must be deceived may be found in a fact to which the court below did not refer, but which is quite obviously known to FDA, the solicitor general's client in this proceeding. The Act contains the usual provision authorizing the promulgation of "regulations for the efficient enforcement of [the] Act".[23] While FDA has concocted many regulations under the Act, it has devised none for any part of § 402(b), the economic adulteration section. However, where FDA has by regulation identified that part of the public whose reaction shall be held to determine whether or not the misbranding provisions of the Act have been violated, it has specified the *ordinary individual* as the standard.[24] The court below, therefore, in selecting the ordinary consumer as the standard in "appearance" cases under § 402(b)(4), was adopting not only the standard which Congress itself has adopted, but

22. "K & D" as used herein refers to FEDERAL FOOD, DRUG, AND COSMETIC ACT: 1938-1949, by Vincent A. Kleinfeld and Charles Wesley Dunn (Commerce Clearing House, Inc., New York, 1949).

23. Act, § 701(a).

24. 21 CFR § 1.9(a)(1) and (2); 21 CFR § 1.10(e)(1); 21 CFR § 1.12(c) and (d); 21 CFR § 1.105(c)(1); 21 CFR § 1.105(f)(1); and 21 CFR § 1.203 (a)(1).

one which FDA, the real plaintiff in this litigation, has itself promulgated by regulation in analogous situations; indeed, it is the only standard so promulgated by FDA.

The decisions of the six United States Courts of Appeals which (P. 12-14) the solicitor general cites and characterizes as inconsistent with that of the court below were all cases under the Federal Trade Commission Act. The first three were cases involving drugs alleged and shown to be inherently dangerous to health when used as the current advertisements directed. The last three did not involve drugs or cosmetics but "advertisements having the capacity to deceive."

In conclusion we submit that the solicitor general's alleged first reason for the granting of a writ is no reason at all. While the solicitor general has not indicated what portion of this Court's Rule 38 (5) he thought authorized his first reason, he has not shown that the decision of the court below in fact conflicts with decisions of other United States Courts of Appeals; that the court below decided any important question of federal law which had not been settled by this Court; or that it decided any federal question in a way probably in conflict with the applicable decisions of this Court.

II.

In stating his second reason for granting a writ, the solicitor general again represents the court below as having held something quite different from its actual holding. He says (P. 14):

> The Court of Appeals held, however, that there would be no adulteration so long as the ordinary consumer did not believe the beverage was composed *entirely* of orange juice.

What the Court of Appeals, with eminent common sense, held was that two things must be proved before food

may be held to be adulterated under § 402(b)(4) on the ground that it appears better or of greater value than it is:

> (1) The existence of a standard article must be proved; in other words, the suspect food may not serve as its own standard; and
>
> (2) The failure of the suspect food, in the view of ordinary consumers under such circumstances as attend retail distribution of the product, to conform to the proved standard.

The difficulty with the libellant's case was succinctly stated by the court below in the following language, which the solicitor general at no point mentions (III R. 487):

> In the instant case, undiluted orange juice is the only defined and familiar food pointed out in the libel and *in the evidence* as possibly would be confused with Bireley's Orange Beverage. (Italics ours.)

The simple fact is that on the trial FDA made no attempt whatever to *prove* any standard for the seized beverage. It proceeded on the theory that it did not have to prove any standard. Samples of orange juice were, however, exhibited to the jury on various occasions,[25] and the fact that the jury saw some orange juice during the trial probably accounts for the lower court's reference to it in the portion of its opinion quoted above.

The position of FDA here that a suspect product in an economic adulteration case may serve as its own standard of comparison is not only patently absurd but is a complete reversal of its historical position. It seems self-evident that no case of economic adulteration of a food product can be made out unless it is first determined what the *un*adulterated food *is*, i.e., unless there is a standard for that product. So, while the language "appear better or of greater value than it is" in § 402(b)(4) is decidedly un-

25. I R. 43a-49a; II R. 331a-340a; 351a-352a; III R. 58a; 265a-266a.

happy,[26] it makes sense if it is interpreted to mean "appear to conform to a standard to which in fact it does not conform", which is, in effect, the way the court below interpreted it.

If there is no standard, there can be no substandard article, hence no economic adulteration. Standards are of two kinds: Popular standards established by household or industrial use, and statutory (federal or state) standards established either by or under legislative authority. Prior to 1938, FDA had no authority to make enforceable federal standards for food products, although it had long besought Congress to grant it that power. This meant that when FDA sought to condemn a food product on the ground of economic adulteration it was put to the inconvenience of proving an established *popular* standard for the product. (Conceivably FDA could rely upon state law standards if it chose to do so.)

Testifying in support of S. 1944 [27] before a subcommittee of the Senate Committee on Commerce on December 7, 1933, Walter G. Campbell, then Chief of the Food and Drug Administration, said [28]:

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26. What special meaning or intent, if any, Congress had in mind when it selected this language is unknown, for the legislative history of the language is a blank. The Act was the end product of a legislative process which commenced on June 12, 1933 when the late Hon. Royal S. Copeland, United States Senator from New York, introduced his S. 1944 which provided in § 3 that a food should be deemed adulterated:

> (b) (4) if any substance has been mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or *create a deceptive appearance.* (Italics ours.)

Nothing was said about appearing better than it is, and, in fact, that language was used for the first time in the final bill of the series, S. 5 introduced January 6, 1937 for (but not by) Senator Copeland. It was not in the three intervening bills, all of which died in Congress. Where the language came from and what it was supposed to mean cannot be determined from the legislative history. All we know is that it turned up in the final bill and was enacted into law.

27. Introduced by Hon. Royal S. Copeland, United States Senator from New York, June 12, 1933. This was the first of a series of bills, the last of which was enacted as the Federal Food, Drug, and Cosmetic Act of June 25, 1938. The legislative history of the Act is given in somewhat abbreviated form in FEDERAL FOOD, DRUG, AND COSMETIC ACT, by Charles Wesley Dunn (G. E. Stechert & Co., New York, 1938). This work is referred to herein as "Dunn".

28. Dunn, pp. 1072-1073.

There are no legal standards now, by which there could be a regulation of food products. • • •

This particular provision [granting the Food and Drug Administration authority to prescribe standards for foods] is one that has been recommended by the Department of Agriculture for the last 20 years, to my personal knowledge.

It is a provision that was recommended by Dr. Wiley in the original bill. It has been considered by Congress from time to time.

• • •

The procedure which we must follow now, is that of showing that trade custom, or household understanding has fixed the composition of food products and determined what they must be.

Paragraphs 1, 2, and 3, of section 7 of the existing law connote standards.

The language employed in the original law is:

> "In the case of food, first, if any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality or strength; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted."

How are you to determine when the standard of a product has been lowered? When some valuable constituent has been removed; or when some ingredient has been substituted, *unless you proceed from a definite conception of a standard?*

In the enforcement of this law now we are required to go into court and show by testimony of manufacturers, and the testimony of housewives, what that standard is.

> You can easily appreciate the fact that the standard set up in such circumstances is not an exact standard. Manufacturing practices and consumer conception of standards of identity vary. This variation will involve a spread of from 5 percent to 10 percent or more.
>
> We are now formulating and publishing administrative standards; as a matter of fact, that was done long before the passage of the present law. They have no legal status under the Federal laws. (Italics ours.)

On the same point the following statement was made in the Senate Report accompanying S. 5, the bill which finally became the Federal Food, Drug, and Cosmetic Act [29]:

> *These* [economic adulteration] *provisions in themselves imply the existence of definitions and standards of identity,* since no one can tell when an article is adulterated under them without first determining definitely what constitutes the unadulterated product. (Italics ours.)

Pursuant to FDA's urgent recommendations, the Act gave FDA complete standard-making powers in the food field,[30] and FDA by regulation has promulgated standards for a great number of foods and drinks, including tomato and pineapple juice.[31]

It has, however, established no standard for either carbonated or non-carbonated orange drinks [32] (or indeed for any soft drinks) under the Act. Other and somewhat diverse standards are, however, and have been for a number of years, well established for orange drinks both car-

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29. Dunn, p. 480.

30. Act, § 401.

31. FOOD AND DRUG ADMINISTRATION SERVICE AND REGULATORY ANNOUNCEMENTS: F. D. C. No. 2, REV. 1.

32. This drink is to be distinguished from orange soda or orange pop, a carbonated drink synthetically flavored and artificially colored and part of the "soda pop" line which traces its origin in the United States to one Townsend Speakman, a Philadelphia chemist, who is supposed to have started our soft-drink industry in 1807 by adding fruit flavor to aerated water. 1 ENCYC. BRIT. (1942) 224.

bonated and non-carbonated, both by state legislation (or regulation) and by the industry. In general, these standards contemplate two different beverages, Orange Drink and Orangeade, the minimum juice content for Orangeade being somewhat higher than that for Orange Drink. In the Commonwealth of Pennsylvania, for example, the standard for Orange Drink, the beverage classification in which Bireley's Orange Beverage falls, was established in 1948 as follows [33]:

> 1618. ORANGE DRINK: The beverage containing not less than 6% of orange juice, permitted sweetening agents, potable water, plain or carbonated, with or without: lemon juice, added fruit acids, citrus oils, certified food color. It shall not contain citrus pulp except that normally obtained from the amount of citrus juice employed in its preparation. No reproduction, design or device depicting the fruit or the juice of the orange shall be used on any label, cap or container.

The Pennsylvania standard for Orangeade requires not less than 15 per cent of orange juice and contains no prohibition against the depiction of the fruit on the label.[34] The Commonwealth also has a standard for something called "Imitation Orange Drink", which does not have to contain any orange juice.[35] U. S. Certified Color is permitted in all of these beverages. As indicated in the note,[36]

33. Official Bulletin, Title 2, Department of Agriculture, Bureau of Foods and Chemistry (Pennsylvania, Chapter XVI, No. 1618.

34. Official Bulletin, Title 2, Department of Agriculture, Bureau of Foods and Chemistry (Pennsylvania), Chapter XVI, No. 1620.

35. Official Bulletin, Title 2, Department of Agriculture, Bureau of Foods and Chemistry (Pennsylvania), Chapter XVI, No. 1619.

36. Florida requires a minimum juice content of 25 per cent for Orangeade; Kentucky, New Hampshire, New York, North Carolina, Ohio, Pennsylvania and Tennessee a minimum of 15 per cent; Minnesota a minimum of 6 per cent; and North Dakota a minimum of 8 per cent. For Orange Drink (whether carbonated or non-carbonated) Michigan requires a minimum of 15 per cent; North Dakota minimum of 8 per cent; Minnesota and Pennsylvania a minimum of 6 per cent; and North Carolina a minimum of 10 per cent (carbonated only). Neither Florida, Kentucky, New Hampshire, New York, Ohio

the minimum orange juice content for Orange Drink (carbonated or non-carbonated) ranges from 6 to 15 per cent, while the minimum orange content for Orangeade (carbonated or non-carbonated) ranges from 6 to 25 per cent.

The customary method of producing the non-carbonated orange drink (which includes Bireley's Orange Beverage) is as follows: A beverage base is manufactured by concentrating orange juice, with or without the addition of lemon juice. Some sugar is ordinarily added to the base, along with citric or lactic acid, orange oil (III R. 47a-48a) and U. S. Certified Colors, being colors certified under the Act by FDA to be harmless and suitable for use in food. The bases for orange drink are made primarily in California, although some are made in Florida. Normally the base is packed in tin cans and pasteurized, and the tins are shipped to local bottling plants in various parts of the country. The local bottler makes the finished drink by mixing with the base substantial quantities of sugar and water. The finished drink is then "flash pasteurized", bottled, capped, and distributed to retail outlets such as grocery stores, soda fountains, amusement park concessions, and the like (III R. 276a-277a, 285a-286a). The

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nor Tennessee has any standard for Orange Drink (whether carbonated or non-carbonated). North Carolina has no standard for non-carbonated Orange Drink. Kentucky and Tennessee have standards for "Imitation Orangeade", and Michigan and Pennsylvania have standards for "Imitation Orange Drink". The latter do not have to contain any orange juice. See Regulation, Chemical Division, Department of Agriculture (Florida); Memorandum, Bureau of Foods, Drinks and Hotels, Department of Health (Kentucky), May 15, 1936, citing Definition of Orangeade, January 1932; Official Bulletin, Orange Drinks, Bureau of Foods and Standards, Department of Agriculture (Michigan); Official Bulletin, Standards and Definitions and Rules and Regulations, Bureau of Food, Department of Agriculture (Minnesota), January 1949, Regulations No. 4(c) and (i), p. 148; Official Bulletin, Beverage Law and Regulations, Department of Health (New Hampshire), 1949, Regulations Nos. 11(e) and 12, pp. 14 and 18; Interpretation, § 201, Art. 17, Agriculture and Markets Law (New York), July 1950, Ch. 48, Laws of 1922, as amended; Official Bulletin, Definitions-Identity, Beverages and Beverage Materials, Department of Agriculture (North Carolina); Official Bulletin, Rules and Regulations, Food Commissioner and Chemist, State Laboratories (North Dakota), May 15, 1950, Regulation No. 17(a) and (b); Official Bulletin, Division of Foods and Dairies, Department of Agriculture (Ohio), Regulation No. 211(b); and notes 33-35, *supra*, (Pennsylvania).

finished beverage is bright orange in color due to the presence of the U. S. Certified Color in the beverage base (III R. 269a).

The drink is essentially sweetened water flavored with from 6 to 15 per cent of citrus juice, predominantly orange, artificially colored with U. S. Certified Color, and containing added ingredients such as orange oil, citric acid, and, if pasteurization is not possible, benzoate of soda or some other preservative (III R. 260a). It carries a label listing the ingredients and using some such generic name as "Orange Drink," "Orange Flavor Drink," or "Orange Beverage".

The obvious question arises: Why has not FDA promulgated standards in this field? The standards and practices in the field are non-uniform, and FDA has ready to its hand a tool which Mr. Campbell testified [37] it had sought for 20 years, and, as pointed out by Daniel P. Willis, Esq., one of FDA's head lawyers, in an article on economic adulteration published in 1946, the standard-making power is peculiarly appropriate for dealing with situations where there is a diversity of similar products.[38]

So far as we have been able to determine, FDA's failure to use its standard-making power has never been clearly explained, but a clue may be found in the fact that, as is common knowledge, FDA is strenuously opposed to the use of U. S. Certified Color in orange-flavored drinks. Early evidence of this is found in a "Notice to the Orange Beverage Industry", dated November 15, 1935, and sent out by Henry A. Wallace, then Secretary of Agriculture. (FDA was then a Department of Agriculture bureau.) According to the notice, the conclusion had been reached that orange drinks "containing yellow artificial color are adulterated under the Food and Drugs Act in a manner

37. *Supra*, pp. 13-14.

38. "Preventing Economic Adulteration of Food", by Daniel P. Willis, 1 FOOD DRUG COSMETIC LAW QUARTERLY 20 (March 1946).

which cannot be corrected by any form of labeling."[39] More recent evidence is found in the answers given by Charles W. Crawford, then Deputy Commissioner of FDA, to certain questions propounded to FDA following the trial of the case below. FDA was asked *inter alia,* (1) whether its attitude toward the use of certified food colors would be changed, and (2) whether in the case of non-carbonated beverages the use of certified food colors would be approved. The answer was that there had been no change in the attitude of FDA since the issuance of the above-mentioned notice dated November 15, 1935.[40]

If FDA were now to move to promulgate a standard it would, of course, be required under the Act [41] to subject to public hearings in advance of adoption any standard it proposed to establish. The public hearings would reveal immediately the existence of well-established popular (III R. 260a-262a) and state [42] standards, all of which permit the use of artificial color, and with which, as FDA well knows, Bireley's Orange Beverage fully conforms; and if, in the face of that, FDA were to promulgate a standard barring the use of artificial color, it would run the grave risk that its standard would not survive if attacked under the Fifth Amendment as being arbitrary and capricious. FDA is, therefore, on the horns of a dilemma. If it exercises its standard-making power under § 401 of the Act, it may very well find itself with a standard on its hands which permits the use of U. S. Certified Color. If in con-

39. Food Field Reporter, October 11, 1948, p. 46. It should be noted that, Mr. Wallace to the contrary notwithstanding, FDA has on a number of occasions in its administrative rulings held that products which would otherwise be considered adulterated because of the addition of artificial color or flavor would not be considered adulterated if the labels specifically stated what was added to the product. See 1 CCH F. D. C. Law Rep. ¶ 3034; TC-12, August 15, 1939 (flavoring extracts); TC-195, March 10, 1940 (addition of carotene to soybean flour); TC-210, March 21, 1940 (coloring in caviar). In each instance FDA indicated that the product would be adulterated by the addition of any such coloring or flavoring material *unless the label specifically stated what was added to the product.*

40. National Bottlers' Gazette, Vol. 68, No. 815 (January 1950), p. 17.

41. Act, § 701.

42. See p. 15, *supra,* note 36.

demnation proceedings, such as the case below, it relies upon and proves existing standards, it is out of court because they likewise permit the use of U. S. Certified Color. In this proceeding it has therefore sought to escape the dilemma by abandoning not only common sense but its historic position and contending that in economic adulteration cases no standard whatever needs to be proved!

What is there in all this for this Court? There is clearly nothing which comes within the language or intent of this Court's Rule 38 (5) (b).

III.

The third and final reason advanced by the solicitor general for the granting of a writ is even less substantial than the first and second. On the trial the claimant conceded that Bireley's Orange Beverage contained no vitamin C; notwithstanding this, the trial court, over strenuous objection, allowed FDA's counsel to introduce the testimony of an "expert" who had killed guinea pigs by feeding them a diet containing no vitamin C. The "expert" was even permitted to produce pictures of the guinea pigs with their legs drawn up in agony. Other evidence was permitted to be introduced showing the development of scurvy in children who received no vitamin C and vividly describing their sufferings.

Claimant's disclaimer of vitamin C as an ingredient made proof of the absence of vitamin C unnecessary; and, if the trial judge had so held, having in mind the discretion which the trial court has in these matters, it seems certain that neither the Court of Appeals nor this Court would have criticized him for it.

It is, however, hornbook law that the mere admission of a fact by one party does not necessarily preclude the other party from offering evidence to prove the fact beyond question; but it is also hornbook law that evidence which is primarily dramatic, emotional, shocking, or revolting in its nature and therefore likely to warp the jury's

judgment, may not be used unless it is the *only* evidence which is available. Thus, in a death action, it was reversible error for the trial court to receive, as evidence of the size and appearance of the deceased in life, a photograph of the dead boy lying in his coffin. "We think that evidence of these facts might have been introduced by means other than of one tending improperly to influence the jury's judgment".[43] So, too, in an action for the negligent injury of a little girl who had lost her foot in a streetcar accident and who was present at the trial, it was error to permit the jury to see the foot preserved in a glass jar, when the only issue was the size of the child at the time of the accident. The jury could perfectly well judge that by observing her size at the trial and noting the lapse of time since the accident.[44] Also, in a husband's action for medical expenses and loss of consortium resulting from injury of his wife caused by a fall on a defective sidewalk, the admission of photographs of the wife's injured foot in various poses was held to be reversible error.[45]

The case upon which the solicitor general relies, *Prudential Insurance Company v. Faulkner* (1934) 68 F. (2d) 676 (C. C. A. 10), involved a situation where the evidence, although harrowing in nature, had to be admitted because it was the *only* evidence which the plaintiff could get. He was suing on an insurance policy on the theory that he had become permanently disabled. Mental instability was alleged as one of his disabilities, and he laid this to his experiences in the battle of the Argonne during World War I where he had been pretty well blown up by shell fire. On appeal it was held that his testimony had been properly admitted.

Of course, no such problem faced FDA on the trial below. Its counsel, the Assistant United States Attorney, could have shown by simple chemical analysis any and all

43. *Allen v. Stokes* (1940) 260 App. Div. (N. Y.) 600.
44. *Rost v. Brooklyn Heights R. R. Co.* (1896) 10 App. Div. (N. Y.) 477.
45. *Selleck v. City of Janesville* (1899) 104 Wis. 570.

relevant facts with respect to the vitamin C content of orange juice and Bireley's Orange Beverage. The choice of the dramatics which were used can be attributed only to a desire on the part of counsel to prejudice the jury. Such conduct is peculiarly improper on the part of government counsel, as this Court emphatically stated in *Berger v. United States* (1935) 295 U. S. 78 (p. 88):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

We submit that the solicitor general's third reason, like his first and second, is without merit.

Statement.

This Court's Rule 27 (4) informs respondents that no statement of the case need be made by them beyond what may be deemed necessary to correct any inaccuracy or omission in the statement of the petitioner, thus leaving it to respondent's counsel in each case to examine their consciences and determine what they believe is necessary. That has not been an easy task in this case. On the one hand, the petition is signed by the lawyer who holds the high post of Solicitor General of the United States; on the other hand, his statement of the record in this case is, we

believe, decidedly misleading. Our doubts have therefore been resolved in favor of pointing out as temperately as we can some of the specific misstatements which the petition contains.

(1). The solicitor general describes the seized product as "basically greatly diluted orange and lemon juice", to which "there are added two yellow coal tar colors, sugar, lactic acid, and orange oil" for the purpose of overcoming the "obvious commercial disadvantages of so weak a mixture * * *".[46]

One would not suspect, from anything the solicitor general has seen fit to disclose to this Court, that the seized product is merely a soft drink identical with or similar to many other orange-flavored soft drinks distributed generally for many years throughout the United States (III R. 260a-265a). The product was labeled "Bireley's Orange Beverage", and the bottler was identified as "Bireley's Inc., Phila., Pa." It is undisputed that the word "beverage" means *any of various drinks, especially of a mild sort, that are essentially sweetened water flavored with fruit juice* (III R. 462a). The product seized was a standard article of commerce in the same sense as cola drinks are standard articles of commerce. The product was not orange juice; it was not sold as orange juice; it was not represented to be orange juice; it was Bireley's Orange Beverage, a soft drink that sold for a nickel.

(2). The petition asserts at several places that the seized product contained coal tar dyes, and at no point even suggests (which was the fact) that the colors used were U. S. Certified Colors, they being colors certified under the Act by FDA, the solicitor general's client, to be entirely harmless and suitable for use in food (Interrogatory No. 8, III R. 25a).

(3). The solicitor general states that the seized product was represented as a good source of vitamin C.[47] No

46. P. 5.
47. P. 5.

such representation was made in any of the labeling; there was no evidence that any such representation was made in any retail outlet where the product was sold; and there was no evidence that anyone who ever purchased the product had ever seen or heard any such representation. Upon what, then, was the solicitor general's statement based?

On the trial, counsel for FDA persuaded the court (erroneously as we believe and vigorously contended below) to admit, based on the cross-examination of two of claimant's witnesses, certain advertising circulars and pamphlets, some of which antedated the seizure by 10 years. In connection with this material, the following should be noted:

(a) The evidence was introduced by the FDA in rebuttal (II 396a-397a), purportedly to refute a statement by one of claimant's witnesses, brought out by counsel for FDA with no basis on direct. That was obviously improper rebuttal.[48]

(b) There was no evidence that the bottler of the seized product, Bireley's Inc., a Delaware corporation, of Philadelphia, Pa., had ever used or was in any way connected with the advertising material;

(c) The pamphlets contain pictures of bottles of various beverages. The bottles pictured are different from the bottles which were the subject of the seizure below;

(d) There was no evidence that the pamphlets had ever been distributed among or been seen by purchasers of the seized product; and

(e) If the gravamen of the complaint against the seized Bireley's Orange Beverage produced by Bireley's Inc. at its Philadelphia plant had been the deceptive advertising

48. *Moyer v. Aetna Life Ins. Co.*, (1942) 126 F.(2d) 141 (C.C.A. 3); *McGlothan v. P.R.R.*, (1947) 72 F. Supp. 176 (D.C. Pa.); *Gaynor v. Atlantic Greyhound Corp.*, (1949) 86 F. Supp. 284 (D.C. Pa.); *Launikitas v. Wilkes-Barre Traction Co.*, (1913) 241 Pa. 458, 88 Atl. 703.

or marketing of the product (as distinguished from economic adulteration of the product itself), FDA would have been without jurisdiction, sole jurisdiction being in the Federal Trade Commission. This is so because of the provisions of the Wheeler-Lea Act [49] which was passed March 31, 1938, three months before the passage of the Federal Food, Drug, and Cosmetic Act, and which vested in the Federal Trade Commission exclusive jurisdiction over false advertising (other than labeling) of food, drugs, and cosmetics.[50] This split in jurisdiction has been criticized,[51] but is undoubtedly what Congress intended.[52]

(4) The solicitor general states that at the time of the seizure "the drink was distributed not only through the usual channels for soft drinks, but also through dairies which marketed it in ordinary quart milk bottles and in the distinctive smaller-sized bottles shaped to resemble milk bottles, adopted for dairy bottling equipment".[53] This is not so. Assuming that "the drink" refers, as it can properly refer, only to the seized product which was bottled in the Bireley's Inc., Philadelphia plant, none of it was distributed through dairies, either at the time of the seizure or at any other time.

(5) The solicitor general states that "extensive surveys among consumers were conducted and that, to at least 1522 of the 3539 persons interviewed, the article appeared to be a food composed entirely or in large part of orange juice".[54] While the issue is a close one, this assertion is probably more misleading than any other made in the petition, certainly more so than anything on the Bireley's bot-

49. Enacted March 21, 1938, 52 Stat. 111.
50. 15 U. S. C. §§ 52-55.
51. 39 Col. L. Rev. 259 (February, 1939).
52. The Federal Trade Commission Act, as amended by the Wheeler-Lea Act, deals at length and in detail with false advertising (but is silent on labels); the Federal Food, Drug, and Cosmetic Act deals at length and in detail with labels (but is silent on false advertising). See speech of Hon. B. Carroll Reece, Cong. Rec. Nov. 26, 1945 (Vol. 91, No. 208) pp. A5488-A5490.
53. P. 5.
54. P. 6.

tles. The plain fact is that no surveys whatever were conducted *"among consumers"*.

The "extensive surveys", which were admitted by the trial court over claimant's strenuous objection, consumed more than 600 pages of the transcript and included exhibits totalling more than 3500 questionnaires, tabulations, summaries, and miscellaneous bottles. Just how the admitted surveys should be classified is not clear; perhaps they should be called "infant feeding surveys", but they certainly were not "consumer" surveys. They were not made as part of an impartial investigation to ascertain what the average individual under ordinary conditions of purchase and use believed Bireley's Orange Beverage to be. On the contrary, they were conducted in 1946 and 1947 under the supervision of FDA in order, if possible, to secure evidence to support the seizure below *which had already been made in 1945*. The real purpose was obviously to find a number of persons who would say that Bireley's Orange Beverage appeared to be composed entirely or in large part of fresh orange juice. There were eight "surveys" in all, and they were all conducted at or in connection with hospitals and clinics by internes, resident physicians, nurses, and nurses' aides acting under instructions of FDA and using questionnaire forms prepared by it. Most of the questions asked at the interviews were directed to mothers or prospective mothers coming to the hospital or clinic for pre-natal or post-natal examinations or for advice as to infant care.

It is, of course, well known that orange juice in its natural state contains a substantial amount of vitamin C and is therefore highly regarded in infant feeding. In fact, mothers of young children and prospective mothers have had it dinned constantly into their ears by hospitals, baby clinics, newspaper articles, advertising, etc., that babies and young children should be dosed liberally with orange juice. If, therefore, young mothers and prospective mothers could be shown bottles of Bireley's Orange Bever-

age under appropriate circumstances, it was highly probable that many of them would say something about orange juice and, of course, this is what happened.

As the record shows (III R. 510-523), respondent sought a reargument before the Court of Appeals on the single issue of the admissibility of the surveys, and a reading by this Court of that portion of the record will demonstrate just how far wrong the solicitor general is when he states that "extensive surveys among consumers were conducted".[55]

Conclusion.

From the standpoint of the developing law of evidence, the issue of the admissibility of the "infant feeding surveys" may very well be the most important issue which has been presented in this litigation. This Court, so far as we have been able to determine, has never been called upon to consider the admissibility of opinion surveys conducted pursuant to procedures such as those devised by Dr. George Gallup of the Institute of Public Opinion.[56] Respondent seriously considered filing a cross-petition with a view to getting a review by this Court of the decision of the Court of Appeals that the trial court had properly admitted the "infant feeding surveys", but decided against that course because of the other issues already in the case.

The Court of Appeals remanded the case to the district court for a new trial, and we urge this Court not to interfere with that disposition. On the next trial, if FDA elects to try the case again, the revolting though highly dramatic scurvy and guinea pig evidence will be excluded; FDA will be required to prove what is the standard to which

55. P. 6.

56. The general principles employed in making consumer surveys are treated in the following authoritative books: A GUIDE TO PUBLIC OPINION POLLS, by George Gallup (Princeton University Press, Princeton, 1948); GAUGING PUBIC OPINION, by Hadley Cantril (Princeton University Press, Princeton, 1944); CONSUMER AND OPINION RESEARCH, by Albert B. Blankenship (Harper & Brothers, New York, 1943) and How TO CONDUCT CONSUMER AND OPINION RESEARCH, edited by Albert B. Blankenship (Harper & Brothers, New York, 1946).

it claims Bireley's Orange Beverage fails to conform; and, if the case gets to the jury, the jury will have to be told that the libel can be sustained only if, in the jury's opinion, the ordinary consumer, under such circumstances as attend the retail distribution of Bireley's Orange Beverage (taking into account such matters as bottling, labeling, retail prices, taste, and physical appearance of the product) believed the product conformed to some standard with which in fact it did not conform. Assuming the "infant feeding surveys" are offered on the next trial, the trial court will be called upon to rule on the question of whether they are relevant under the test the Court of Appeals laid down (and we submit it is the proper test), that is, the "reaction of the ordinary consumer under such circumstances as attended retail distribution of this product" (III R. 484). If the "infant feeding surveys" are admitted and the verdict is for FDA, or if the surveys are excluded (as they should be) and the verdict is for respondent, the clear-cut and single question of the admissibility of the surveys will remain for further examination in the appellate courts. That examination will be facilitated if the question can be presented, after a new trial, on a record free from other issues of substance. There appear, therefore, to be no "special and important reasons"[57] why this Court should review the present record.

The solicitor general's petition should be denied.

Respectfully submitted,

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57. Rule 38 (5).